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NOs. 90-722 & 90-956

In the Supreme Court of the United States

OCTOBER TERM, 1990

CURTIS CAMPO, JR.
Plaintiff-Petitioner

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., Plaintiff-Petitioner, and
ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

Petitions No. 90-722 and 90-956 present the same questions arising from the same case. These questions are:

A. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688, and finding that Petitioner was engaged in "maritime employment" as defined in Section 902(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

B. Whether the Circuit Court of Appeals for the Fifth Circuit correctly applied Supreme Court precedent, the Jones Act, and the Longshore and Harbor Workers' Compensation Act in finding that Petitioner, a shore-based terminal worker who assisted with the loading and unloading of vessels, was not a Jones Act seaman, but rather a worker covered under the Longshore and Harbor Workers' Compensation Act.

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STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. Sec. 688, and the general maritime law. After hearing all of plaintiff's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act and that Campo's remedy against his employer was under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 *et seq.* ("LHWCA"), since the work Campo performed related to the loading and unloading of vessels, the traditional function of a longshoreman/harbor worker. Appendix at A-6.[1] This determination was affirmed by the United States Court of Appeals for the Fifth Circuit. Appendix at A-3 - A-4.

Petitioner, National Union Fire Insurance Company ("National Union"), is the Longshore and Harbor Workers' Compensation insurer of Electro-Coal. National Union filed an Intervention in Campo's suit seeking recoupment of compensation and medical benefits received by Campo in accordance with the LHWCA in the event it was determined that Campo was a seaman. National Union filed a separate Petition for Certiorari adopting by reference the arguments and authorities cited in Campo's Petition for Certiorari.

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[1] Petitioners in No. 90-722 and 90-956 filed identical Appendices with the same pagination. The opinions of the court of appeals and district court are unpublished and are reproduced in both Appendices at A-1 and A-6 respectively, and citations to these opinions are in the form "Appendix at A-____."

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either onto other barges or seagoing vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-2. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in a cab, above the dock, and pull various levers to move cargo onto conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting that Campo was permanently

assigned to work aboard any of these vessels as a member of the crew. Appendix at A-11.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo carrying vessels, both river and ocean going, are owned and operated by many different companies. None of the cargo carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-8. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-3 - A-4.

Campo was injured when he fell into a barge, moored at a dock, which he was aboard preparing it to take on cargo. Appendix at A-3. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-3. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crewmember nor did Campo perform a substantial amount of his work on vessels. Appendix at A-11.

Campo brought suit against Electro-Coal under the

Jones Act, contending that he was a "seaman." Electro-Coal defended contending, *inter alia*, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, but was covered by the LHWCA and engaged in "maritime employment" as defined in Section 902(3) of the LHWCA. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

ARGUMENT

1. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not involve any issues of constitutional law, federal statutory law, or federal maritime law. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the LHWCA, the Jones Act, and the precedents of this Court.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp v. Western Well Works, Inc.*, 261 U.S. 378, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to reargue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." *Rice*, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED BOTH THE JONES ACT AND THE LHWCA IN DETERMINING THAT CAMPO IS COVERED UNDER THE LHWCA.

A. CAMPO WAS NOT A JONES ACT SEAMAN.

Under the Fifth Circuit's precedents of *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), and *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), a maritime worker qualifies as a seaman if:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or on an identifiable fleet of vessels acting together or under one control and;

2. The work he performed contributed to the function of the vessel or the accomplishment of its mission.

781 F.2d at 1074 - 76. The undisputed facts established

that Campo was not a crew member of any vessel, nor was he assigned permanently to any vessel or fleet of vessels, nor did he perform significant work on vessels. Appendix at A-13 - A-14.

The requests for certiorari rest on the grounds that in most cases the question of seaman status should be determined by the jury. This completely undermines the purpose of a directed verdict. In Jones Act cases "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. *See, e.g., Landry v. Hunthnance Drilling Company*, 889 F.2d 1469, 1470 (5th Cir. 1989); *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of the federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. *Galloway v. United States*, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 333-35 (1979) (offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51 (1986). In *Anderson*, this Court noted that "judges are not required to submit a question to the jury. . . unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). Campo put forth no evidence

from which a jury could infer that he was permanently assigned to a vessel or fleet of vessels.

B. CAMPO WAS A SHORE-BASED TERMINAL WORKER COVERED BY THE LHWCA.

All of the evidence presented indicated that Campo was a shore-based harbor worker who was involved with the loading and unloading of vessels, classic stevedoring work covered by the LHWCA. Appendix at A-2-A-4. Campo was engaged in "maritime employment" on navigable waters within the meaning of Section 902(3) of the LHWCA, Title 33 United States Code, making the LHWCA Campo's remedy against Electro-Coal. Appendix A-4. Section 902(3) of the LHWCA provides:

> The term "employee" means any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, ship builder, and ship breaker. . . .

(emphasis added.)

Under *Pizzotolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988), and other precedents of this Court, Campo is precluded from recovering under the Jones Act since the Jones Act and the LHWCA are mutually exclusive statutes. In *Pizzotolo*, another claim involving Electro-Coal's terminal, the plaintiff was a shore-based terminal worker, like Campo. Pizzotolo was injured as he attempted to repair one of the conveyors used to load and unload barges. The court held that plaintiff was a shore-based harbor worker who had limited contact with vessels and concluded that Pizzotolo

was not a seaman.

The decisions below are in accord with the decisions of this Court holding that the Jones Act and the LHWCA are mutually exclusive statutes. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 n.12 (1971); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 6-7 (1946); *Norton v. Warner Co.*, 321 U.S. 565, 570 (1944).

C. SUPREME COURT PRECEDENT.

Petitioners ignore the recent opinions of this Court interpreting the LHWCA which resolve the questions raised by Petitioners. These decisions establish that Campo was covered under the LHWCA. In *Herb's Welding v. Gray*, 470 U.S. 414 (1985), the Court ruled that the term "maritime employment" appearing in Section 902(3) of the LHWCA *was not* limited to the occupations therein enumerated: " 'Maritime employment' is not limited to the occupations specifically mentioned in § 2(3). . . ." 470 U.S. at 423. Further, by use of the word "including" in Section 902(3), "Congress indicated that the specifically mentioned occupations are not exclusive." *Id.* at 423 n.9 (citing *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 - 78 n.7 (1979) and H.R. Rep. No. 92-1441, p.11 (1972)). In *Herb's Welding*, this Court found the scope of coverage of the LHWCA to be:

> [The LHWCA,] as amended, 33 U.S.C. § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or

> building a vessel, § 903(a). Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test.

470 U.S. at 415-16 (footnote omitted).

Campo meets both the "situs" and "status" requirements of the LHWCA. Campo's accident occurred on navigable waters aboard a barge which he was aboard preparing for loading. Appendix A-3-A-4. In *Director v. Perini North River Associates*, 459 U.S. 297 (1983), the claimant was injured on the deck of a cargo barge afloat in the Hudson River, while giving directions to a crane operator. A line which was being used to keep the cargo in place snapped as the cargo was in the process of being unloaded. After an extensive review of the history and purpose of the LHWCA, the Supreme Court held that the claimant was a covered employee under Section 902(3) of the LHWCA:

> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) and is covered under the LHWCA, providing, of course, that he is an employee of a statutory "employer" and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their duties upon navigable waters.

Id. at 324 (footnotes omitted).

In *Chesapeake and Ohio Railway Company v.*

Schwalb, 110 S.Ct. 381 (1989), this Court again found that shore-based terminal workers who were injured at facilities where coal was transferred to and from vessels were covered by the LHWCA, and *not* the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51-60, which the Jones Act incorporates and follows. Much like Electro-Coal's terminal, the terminals in *Schwalb* consisted of conveyor belts which were used to load and unload coal from vessels. The workers in *Schwalb* performed general housekeeping services, repairs, maintenance, and other services which were integral to the loading and unloading operations of their employers, and were hence covered by the LHWCA:

> The employment that is maritime within the meaning of § 902(3) expressly includes the specified occupations but obviously is not limited to those callings. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, n.9, 105 S.Ct. 1421, 1427, n.9, 84 L.Ed.2d 406 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78, n. 7, 100 S.Ct. 328, 334, n. 7, 62 L.Ed.2d 225 (1979). . . .
>
> * * *
>
> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. *Such employees are engaged in activity that is an integral part of and essential to those overall processes.* That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo.

110 S.Ct. at 384-85 (emphasis added). There can be no doubt that the work Campo performed was "an integral or essential part of loading or unloading a vessel." *Id.* at 384.

Petitioners' proposed interpretation of the LHWCA is contrary to the express wording of the LHWCA and the precedents of this Court, and would result in every shore-based harbor worker being deemed a seaman. The lower courts' determinations are in full accord with the LHWCA and the decisions of this Court.

The cases relied on by Petitioners are inapposite and predate the above-mentioned decisions of this Court. The original opinion in *Legros v. Panther Services Group, Inc.*, 874 F.2d 953 (5th Cir. 1989), was vacated by the Fifth Circuit when it granted rehearing *en banc*. 874 F.2d at 954. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the worker was found not to be a seaman where the work was performed on a vessel out of navigation with "neither captain nor crew." 342 U.S. at 190-91. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), the plaintiff, unlike Campo, "had no duties with the handling of cargo and no shore duties." 321 U.S. at 568. *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252 (1958), involved a plaintiff who was assigned to work on a single vessel on the high seas. Similarly, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), did not involve a shore-based terminal worker, but rather concerned a crewmember assigned to a dredge who performed deckhand duties and had "a significant navigational function." 352 U.S. at 373-74.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or fleet of vessels. Campo was covered under the LHWCA since his work involved the loading and unloading of barges at a marine terminal on the Mississippi River. The decisions of the lower courts correctly applied the Jones Act, the LHWCA, and the precedents of this Court. The questions raised by Petitioners have been resolved by the earlier decisions of this Court which interpret the LHWCA and discuss the term "maritime employment" as used in Section 902(3) of the LHWCA.

Respectfully submitted:

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APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.